No. __-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 12, 2000

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QUESTION PRESENTED

Whether a New York City law that bans throughout the City virtually all outdoor tobacco product advertising and indoor tobacco product advertising visible from the street is preempted under Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . . ."

PARTIES BELOW

The parties before this Court are those set forth in the caption, which are the same parties that appeared in the United States Court of Appeals for the Second Circuit.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners The Greater New York Metropolitan Food Council, Inc., the Advertising Freedom Coalition, and the Advertising Club of New York, Inc. inform the Court that they have no parent companies and no subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES BELOW	ii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. The Second Circuit's Decision In This Case Results In A Circuit Split That Directly Undermines Congress' Intent In Passing The FCLAA	8
II. The Second Circuit's Decision In This Case Conflicts Directly With This Court's Opinion In *Cipollone*	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	PAGE
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992)	5, 6, 7, 9, 10, 11, 13, 13n, 14, 15, 15n, 16
Federation of Advertising Industry Representatives, Inc. v. *City of Chicago*, 12 F.Supp. 2d 844 (N.D. Ill. 1998), *rev'd*, 189 F.3d 633 (7th Cir. 1999)	7, 8n, 9, 10, 13n, 14n.
FMC Corp. v. *Holliday*, 498 U.S. 52 (1990)	14
Gade v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992)	6
The Greater New York Metropolitan Food Council, Inc. v. *Giuliani*, No. 98 Civ. 251 (DAB), 1998 WL 879721 (S.D.N.Y. Dec. 16, 1998), *rev'd*, 195 F.3d 100 (2d Cir. 1999)	*passim*
Lindsey v. *Tacoma-Pierce County Health Department*, 8 F.Supp. 2d 1213 (W.D. Wash. 1997), *rev'd*, 195 F.3d 1065 (9th Cir. 1999)	8, 8n, 9n, 9-12, 13, 13n, 14

PAGE

Medtronic, Inc. v. *Lohr*,
518 U.S. 470 (1996)..... 11, 15, 15n

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Insurance Co.*,
514 U.S. 645 (1995)..... 15n

Penn Advertising, Inc. v. *Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 1204 (1997)..... 6, 7, 9, 10, 13n, 14n

Rockwood v. *City of Burlington*,
21 F.Supp. 2d 411 (D. Vt. 1998)..... 8n

Vango Media, Inc. v. *City of New York*,
34 F.3d 68 (2d Cir. 1994)..... 5, 6

Constitutional Provisions:

N.Y. Const. art. I, sec. 8..... 4

U.S. Const. amend. I..... 4

U.S. Const. art. VI, cl. 2..... 2

Newspaper Articles:

Seattle Times, Dec. 5, 1999, at B3..... 9n

PAGE

Statutes:

Administrative Code of the City of New York, Article 17-A of subchapter 7 of chapter 1, title 27 ..... *passim*

Federal Cigarette Labeling and Advertising Act

15 U.S.C. § 1331 *et seq.* (1994) ..... *passim*

15 U.S.C. § 1331(2) (1994) 7, 13n

15 U.S.C. § 1334 (1994) 2

15 U.S.C. § 1334(a) (1994) 12

15 U.S.C. § 1334(b) (1994) ..... *passim*

Judicial Code:

28 U.S.C. § 1254(1) (1994) 1

28 U.S.C. § 1331 (1994) 5

28 U.S.C. § 1343 (1994) 5

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case, entered on October 25, 1999.

OPINIONS BELOW

The December 16, 1998 memorandum opinion and order of the United States District Court for the Southern District of New York (Batts, J.) is unreported. It is reprinted in the Appendix hereto at 21a-40a. The October 25, 1999 opinion of the Court of Appeals for the Second Circuit is reported at 195 F.3d 100. It is set forth in the Appendix at 1a-20a.

JURISDICTION

Jurisdiction of this Court to review the judgment of the court of appeals entered on October 25, 1999 is invoked under 28 U.S.C. § 1254(1) (1994). This petition is timely filed within 90 days of that decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to determine whether a New York City Ordinance, Article 17-A of subchapter seven of chapter one of Title 27 of the Administrative Code of the City of New York ("Article 17-A"), is preempted by the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), 15 U.S.C. § 1331 *et seq.*

Article 17-A is set forth in the Appendix to this petition at 41a-47a.

Section 5 of the FCLAA provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334 (1994).

The Supremacy Clause of the United States Constitution, art.VI, cl. 2, provides in relevant part that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This petition presents the Court with a conflict between rulings of the Second, Fourth, Seventh and Ninth Circuits concerning the application of the preemption provision of the Federal Cigarette Labeling and Advertising Act. In this case, Petitioners challenged, on federal preemption grounds, a New York City law, Article 17-A, which virtually eliminates throughout the City outdoor tobacco product advertising and indoor tobacco product advertising that may be seen from the street. The United States Court of Appeals for the Second Circuit allowed the Ordinance to stand, with the exception of a provision entitling retailers to post a single sign stating "TOBACCO PRODUCTS SOLD HERE," which was held to be preempted. The Second Circuit's holding was consistent

with previous rulings of the Fourth and Seventh Circuits, which upheld similar ordinances against preemption challenges for essentially similar reasons. Less than a month after the Second Circuit held the New York City ordinance not to be preempted, the United States Court of Appeals for the Ninth Circuit held a virtually identical Resolution, imposed in the state of Washington by the Tacoma-Pierce County Health Department Board of Health, to be preempted in its entirety by Section 1334(b) of the FCLAA. Copies of each of the four Court of Appeals rulings are annexed to this petition. (App. 1a-20a, 48a-61a, 62a-74a, and 75a-93a) As a result of these conflicting rulings, the ability to display advertising and promotion of tobacco products on retail premises now varies widely from state to state, and depends entirely on the geographical location of the advertiser.

The Challenged Law

Article 17-A, as enacted in 1998, makes it "unlawful for any person to place, cause to be placed, maintain, or cause to be maintained" any "tobacco product advertisement within one thousand feet in any direction of any school building, playground, child day care center, amusement arcade, or youth center, in any outdoor area . . . ." (App. 44a) It further bans such advertisements inside any building within 1,000 feet of these areas when such advertisements are within five feet of any exterior window or any door used by the public, unless the advertisement is parallel to the street and facing inwards, or affixed to a wall panel or similar structure perpendicular to the street. (App. 45a) The land mass covered by Article 17-A, combined with areas already off-limits to tobacco advertising, accounts for over 94% of the City.

As originally enacted, the ordinance contained an exception to these advertising restrictions which permitted the placement of a single black-and-white text-only "tombstone" sign of a specified size and color outside stores stating "TOBACCO PRODUCTS SOLD HERE" (App. 45a) The

United States Court of Appeals for the Second Circuit held that exception to be preempted, concluding that it was inconsistent with Section 1334(b) of the FCLAA. (App. 12a-15a) The ordinance therefore now prohibits *all* outdoor tobacco product advertising within the vast forbidden zones, on pain of civil penalties and injunctive relief, including mandatory cigarette license revocation for a third violation within an 18-month period.

The Parties and the Basis for the Litigation

Petitioner, the Greater New York Metropolitan Food Council, Inc., is comprised of numerous small businesses involved in the food industry nationwide, including over 500 independent supermarkets and various small retail stores located throughout the five boroughs of New York City. Many of these supermarkets and small shops advertise cigarettes by posting signs in their store windows, on their doors or outside their stores. Petitioners, The Advertising Freedom Coalition and the Advertising Club of New York, Inc., are associations that represent various advertising interests, including manufacturers, retailers, advertising agencies, media organizations, public relations firms and others, many of whom advertise tobacco products through the use of billboards, outdoor signs, and other means. All three petitioners represent constituencies that advertise and wish to continue to advertise tobacco products in areas of New York City that Article 17-A places off limits.

Petitioners brought this § 1983 civil rights action in the United States District Court for the Southern District of New York against Respondents, the City of New York and the City officials responsible for enforcing Article 17-A (hereinafter collectively referred to as "New York" or the "City"). The action sought a declaratory judgment that Article 17-A is preempted by federal law and that it violates both the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution. Petitioners also

sought a permanent injunction against enforcement of Article 17-A. Jurisdiction of the district court existed pursuant to 28 U.S.C. §§ 1331 and 1343.[1]

The District Court Decision

Following discovery, the parties cross-moved for summary judgment. On December 18, 1998, the district court granted Petitioners' motion for summary judgment, denied Respondents' cross-motion for summary judgment, and permanently enjoined the City from enforcing Article 17-A on the ground that it was expressly preempted by Section 1334(b) of the FCLAA. (App. 37a) In light of its preemption ruling, the district court found it unnecessary to reach Petitioners' additional arguments. (App. 40a)

Relying heavily on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), and the Second Circuit's opinion in *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), the district court noted that both courts had counseled that "the preemptive scope of the . . . [FCLAA] is governed entirely by the express language in § [1334(b)]." (App. 26a) After a careful examination of the language and meaning of that provision, the district court concluded that Article 17-A was preempted in its entirety because it constituted (1) a "requirement or prohibition," (2) "based on smoking and health," (3) "with respect to the advertising or promotion of cigarettes." (App. 27a-37a)

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[1] The 1998 settlement agreement between the major cigarette manufacturers and the states, including New York, does not affect Petitioners' case. While the settlement agreement does include some consented-to advertising restrictions, it continues to permit advertising that Article 17-A would eliminate—specifically, indoor and outdoor advertising displayed on the premises of retail establishments, such as those of members of Petitioner Greater New York Metropolitan Food Council, that sell tobacco products. Furthermore, the agreements apply only to their private signatories.

Respondents raised two main arguments against preemption: (1) that Article 17-A was not "based on smoking and health" because its articulated purpose was to "promote enforcement" of New York laws banning the sale or distribution of tobacco products to minors and was therefore not health-related, and (2) that Article 17-A is not "with respect to the advertising or promotion of any cigarettes" because, like a similar Baltimore ordinance that had survived a preemption challenge in the Fourth Circuit (*see Penn Advertising, Inc.*v. *Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997)) (App. 48a-61a), Article 17-A supposedly restricted only the location of tobacco advertisements, rather than advertising content. The district court rejected both arguments. (App. 28a-37a)

In disposing of Respondents' first argument, the district court relied upon *Gade* v. *National Solid Waste Management Ass'n*, 505 U.S. 88 (1992), for the proposition that courts are not bound by the articulated purpose of an ordinance for preemption purposes, but must consider both its actual purpose and effect. (App. 28a) After examining the legislative history of Article 17-A, the district court concluded Article 17-A was "based on smoking and health" because both the actual purpose and effect of the ordinance was to promote health. (App. 28a-31a)

As to the Respondents' second argument, the so-called "content/location distinction," the district court found "no support for such a distinction, either in the FCLAA itself" or in the relevant case law. (App. 32a) Noting that the actual language of Section 1334(b) does not support any distinction between content and location restrictions, the district court rejected the reasoning of *Penn Advertising* and found the content/location distinction proposed by Respondents inconsistent with both this Court's decision in *Cipollone* and the Second Circuit's decision in *Vango Media*. (App. 32a-37a)

The Decision of the Court of Appeals

The Second Circuit reversed the decision as it applied to the bulk of the ordinance, affirming the district court's decision only insofar as it pertained to Article 17-A's tombstone provision. (App. 19a) The court of appeals recognized that under the plain language of Section 1334(b) all of Article 17-A would fall within the preemptive scope delineated by Congress. (App. 8a-9a) The court did not deny, as the district court had found, that the New York law was a "requirement or prohibition," or that it was "based on smoking and health," or that, on its face, it was "with respect to the advertising or promotion of . . . cigarettes." But the court nevertheless refused to read Section 1334(b) that way, cautioning against an "overly-expansive, literal interpretation" of Section 1334(b) that "could subvert the presumption against preemption." (App. 9a) Instead, it dismissed the express language used by Congress—language that this Court described in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), as "provid[ing] a 'reliable indicium of congressional intent with respect to state authority," *id.* at 517—as "provid[ing] little insight into the preemptive scope intended by Congress." (App. 8a) Rather than give effect to the language of Section 1334(b), the court of appeals found in the policy stated in Section 1331 of the FCLAA—to avoid "diverse, nonuniform and confusing advertising standards"—a basis for concluding that "mere location restrictions" on tobacco advertising do not create the kind of "diverse, nonuniform and confusing" advertising regulations Congress sought to avoid. (App. 10a-18a) Applying the same anti-textual content/location distinction that had been applied by the Fourth Circuit in *Penn Advertising* and by the Seventh Circuit in *Federation of Advertising Industry Representatives, Inc.* ("FAIR") v. *City of Chicago*, 189 F.3d 633 (7th Cir. 1999), in holding similar legislation not to be preempted, the Second Circuit held that the bulk of the ordinance was not preempted because it "merely" restricted the location and not the content of tobacco product advertising. (App. 15a-18a)

Three weeks after the opinion of the court of appeals was entered on October 25, 1999, the Court of Appeals for the Ninth Circuit in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999) (App. 75a-93a), held a virtually identical scheme designed to limit tobacco advertising in Tacoma, Washington to be preempted for the very reasons relied upon by the district court in this case and rejected by the Second Circuit. The Ninth Circuit was aware of, and explicitly rejected, the reasoning of the Second Circuit. (App. 86a-89a)

REASONS FOR GRANTING THE WRIT

I

The Second Circuit's Decision In This Case Results In A Circuit Split That Directly Undermines Congress' Intent In Passing The FCLAA

The Second Circuit's opinion in this case directly conflicts with a ruling of the Ninth Circuit in a nearly identical case, *Lindsey* v. *Tacoma-Pierce County Health Department*.[2] (App. 75a-93a) In *Lindsey*, the Ninth Circuit struck down a Resolution of the Tacoma-Pierce County Health Department (the "Resolution"), effectively banning outdoor tobacco adver-

[2] The *Lindsey* court, like the Second Circuit in this case and the Seventh Circuit in *FAIR*, reversed the district court's decision below. *See Lindsey* v. *Tacoma-Pierce County Health Department*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997) (holding that no part of Resolution essentially banning outdoor advertising of cigarettes was preempted by the FCLAA), reversed by *Lindsey*, 195 F.3d 1065 (9th Cir. 1999); *Federation of Advertising Industry Representatives, Inc.* ("*FAIR*") v. *City of Chicago*, 12 F. Supp. 2d 844 (N.D. Ill. 1998) (holding that ordinance restricting outdoor cigarette and alcohol advertising was preempted by FCLAA in its entirety), *reversed by FAIR*, 189 F.3d 633 (7th Cir. 1999). This diversity of opinions on the meaning of Section 1334(b) illustrates the extent of the confusion surrounding this important issue. *See also Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding ban of outdoor advertising of cigarettes to be preempted).

tising in Pierce County, Washington, on the ground that it was preempted by Section 1334(b). The Resolution in *Lindsey*, like Article 17-A, banned all tobacco advertisements that could be seen from the street unless they were presented in a specified tombstone format. (App. 77a-79a) The Resolution further prohibited the display of the specified tombstone signs if visible from "a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park." (App. 78a) Unlike the Second, Fourth, and Seventh Circuits, the Ninth Circuit struck down the Resolution in its entirety, concluding that it was preempted by Section 1334(b).[3]

The Board of Health in *Lindsey*, like New York City here, did not contend that the plain language of the FCLAA failed to preempt its ban on outdoor tobacco advertisements. (App. 84a) Rather, the Board, like the City here, tried (in the language of the Ninth Circuit) "to evade the express language of the FCLAA's preemption provision" by "arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements." *Id.* The Ninth Circuit, relying on this Court's decision in *Cipollone*, dismissed this argument, explicitly rejecting the decisions of the Second, Fourth and Seventh Circuits and finding instead that the content/location distinction set forth in those cases "ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent." *Id.*

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[3] On December 28, 1999, the Ninth Circuit ordered the parties to file simultaneous briefs setting forth their respective positions on whether the *Lindsey* case should be reheard *en banc*. In fact, the Tacoma-Pierce Health Department has determined not to appeal the ruling of the Ninth Circuit. *See Seattle Times*, Dec. 5, 1999, at B3. This Court will have the opportunity to resolve the circuit split only by granting review in this case and/or the *FAIR* case from the Seventh Circuit, as to which a petition for a writ of *certiorari* is being filed contemporaneously.

The Ninth Circuit looked first to the plain language of Section 1334(b), concluding that the resolution was "preempted by the clear and express language" as a (1) requirement or prohibition, (2) based on smoking and health, (3) with respect to the advertising or promotion of cigarettes. The Resolution, the court concluded was (1) a local law, (2) pertaining to health matters related to cigarette smoking, that (3) expressly prohibited outdoor tobacco advertisements and regulated point of sale information. (App. 83a-84a)

The *Lindsey* court then examined—and rejected as "not supported by the plurality decision in *Cipollone*" (App. 86a)—the efforts of the Courts of Appeals of the Fourth, Second and Seventh Circuits to exalt what they perceived to be the "purpose" of Section 1334(b) over the plain language of the statute. Noting that both the Second and Seventh Circuits "[r]ecogniz[ed] that the text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions," the Ninth Circuit criticized the decisions of its sister circuits for erroneously "turn[ing] to the Congressional purpose behind the FCLAA statute for support" for this distinction and for misconstruing that purpose by incorrectly concluding that location restrictions "do not lead to the 'diverse, nonuniform, and confusing' advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute." (App. 86a-87a) The court concluded that:

> "The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. . . . [T]he failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case

> present a good example of the multitude of different regulations tobacco advertisers face. . . . [As a result of these separate advertising regulations], a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating Section 1334(b)."

(App. 87a-88a) (internal citations omitted)

The Ninth Circuit further concluded that the history of Section 1334(b) did not support the content/location distinction of the Second and Seventh Circuits, noting that the distinction was inconsistent with this Court's interpretation of the 1969 amendments in *Cipollone* as broadening the scope of preemption *beyond* state laws that only regulated the "content" of tobacco advertisements. (App. 89a-90a) The court noted that the 1965 preemption provision of the FCLAA provided that, "[n]o *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes," (App. 89a, quoting 15 U.S.C. § 1334(b) (1964 & Supp. I 1965)), and that this provision was amended in 1969 to its present form. Quoting *Cipollone*, the Ninth Circuit pointed out that the language of the current preemption provision is "much broader" than the 1965 version in at least two ways:

> "First, the later Act bars not simply 'statements,' but rather 'requirements or prohibitions imposed under state law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."

(App. 89a, quoting *Cipollone*, 505 U.S. at 520) *See also Medtronic Inc.* v. *Lohr*, 518 U.S. 470, 489 n.9 (1996) (noting that "the statute in *Cipollone* was clearly intended to have a broader preemptive effect than its 1965 predecessor"). The court held that "[t]o give effect to the 1969 amendments, the

distinction between content regulations and location regulations cannot . . . be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." (App. 90a)

Finally, the *Lindsey* court held that the structure of the FCLAA itself, when viewed as a whole, militated against the content/location distinction upheld by the other courts of appeal. Specifically, the court noted that the FCLAA's other preemption provision, which provides that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package," 15 U.S.C. § 1334(a), stands in sharp contrast to Section 1334(b) in that, unlike Section 1334(b), it is directed only at specific "statements" relating to smoking and health. As the Ninth Circuit noted, "[i]n order to distinguish between the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations." (App. 90a) To accept the content/location distinction, the court noted, would be "to give 'requirement or prohibition' in subsection (b) essentially the same meaning as 'statement' in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings." (App. 90a)

There is thus a direct conflict between the preemption rulings that now govern in the 11 states within the three circuits that have held legislation such as Article 17-A not to be preempted and in the 9 states within the Ninth Circuit that has held such legislation to be preempted. The split amongst the circuits on this important issue should now be resolved.[4]

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[4] The circuit split on the meaning of Section 1334(b) also warrants review by this Court because the very fact of the split undermines the Congressional purpose stated in the FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations," and of protecting "commerce and the national economy" to "the maximum extent consistent with" the policy of informing the public about the health risks of smoking.

II.

The Second Circuit's Decision In This Case Conflicts Directly With This Court's Opinion In *Cipollone*

The Second Circuit's opinion is not only in conflict with the Ninth Circuit's decision in *Lindsey*, but is also in direct conflict with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), the only case in which this Court has directly addressed the meaning of Section 1334(b). In *Cipollone*, a divided Court held that Section 1334(b) preempted certain common law claims against cigarette manufacturers, but did not preempt other such claims. *Id.* at 520-530.[5] The Second Circuit's approach to interpreting Section 1334(b) ignores those aspects highlighted by this Court in *Cipollone* as most important—specifically, the plain language of the statute and the 1969 amendments broadening its preemptive scope.

A majority of the Court in *Cipollone* concluded that "the preemptive scope of [Section 1334(b)] is governed entirely by the express language of [Section 1334(b)]." *Cipollone*, 505 U.S. at 517 (plurality opinion); id. at 531-32 (Blackmun, J.,

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See 15 U.S.C. § 1331(2) (1994). State and local tobacco advertising regulations, such as those challenged in *Penn Advertising*, *FAIR*, *Lindsey*, and this case, have been passed in cities throughout the country, each setting different restrictions on tobacco products advertising. These regulations impose a significant burden on store owners and other tobacco advertisers, such as Petitioners, who must, on their own, figure out the ever-changing boundaries of each locale's restricted areas by keeping track of the frequent openings and closings of day-care centers, youth centers, amusement arcades, playgrounds, and/or schools, while complying with state and national advertising regulations as well. This is the very "diverse, nonuniform and confusing" result Congress sought to avoid by passing the FCLAA.

[5] The plurality opinion was written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Blackmun's opinion, joined by Justices Kennedy and Souter, concluded that none of petitioners' claims were preempted by the FCLAA. Justice Scalia's opinion, joined by Justice Thomas, concluded that all of petitioners' claims were preempted by the FCLAA.

concurring in part and dissenting in part) (agreeing with plurality that express language of Section 1334(b) is determinative). Finding that Section 1334(b) "provide[d] a 'reliable indicium of congressional intent with respect to state authority,' " a majority of the Court also explicitly rejected the lower courts' implied preemption analysis, which the Court faulted for looking beyond the text of the statute. *Id.* at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part). Finally, and most notably, the *Cipollone* Court unanimously agreed that the plain meaning of Section 1334(b) was of primary importance in interpreting the preemptive scope of the FCLAA. *See* 505 U.S. at 521-22 (" 'We must give effect to this plain language [of Section 1334(b)] unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' In this case there is no 'good reason to believe' that Congress meant less than what it said.") (internal citation omitted); *id.* at 532 ("[A]n interpreting court must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' ") (Blackmun, J., concurring in part and dissenting in part) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 544 ("[O]ur job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning.") (Scalia, J., concurring in part and dissenting in part).

As the *Lindsey* court noted, the Second Circuit's opinion simply refuses to take the plain language of Section 1334(b) seriously, as required by *Cipollone*. (App. 86a-89a)[6] The Second Circuit's concerns about the consequences of a "literal" reading of Section 1334(b) stand in stark contrast to this

[6] The same is true of both the Fourth Circuit's decision in *Penn Advertising* and the Seventh Circuit's decision in *FAIR*, both of which upheld similar tobacco advertising ordinances (except for a tombstone provision in the ordinance at issue in *FAIR*) against a preemption challenge on the basis of the content/location distinction. *Penn Advertising*, 63 F.3d at 1324; *FAIR*, 189 F.3d at 639.

Court's repeated assertion that the plain language of Section 1334(b) is controlling. Focusing not only on the "with respect to" language of § 1334(b), but on the entire provision as a whole, this Court made clear in *Medtronic*, 518 U.S. 470, that the text of Section 1334(b) is hardly as unboundedly expansive as the Second Circuit suggests, but is rather "targeted at a limited set of state requirements—those 'based on smoking and health'—and then only at a limited subset of the possible applications of those requirements—those involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute." *Id.* at 488. *See also Cipollone*, 505 U.S. at 517, 521-22 (noting the clarity of the language of Section 1334(b)). The refusal of the Second Circuit to give effect to the plain meaning of Section 1334(b) is thus in stark contrast to this Court's jurisprudence.[7]

The Second Circuit's reliance on the legislative history of Section 1334(b) also runs counter to this Court's examination of that legislative history in *Cipollone*. Specifically, the Second Circuit's opinion fails to even acknowledge, let alone appreciate the significance of, the central element of the legislative history of Section 1334(b) identified by this Court in *Cipollone*, namely, that the 1965 version of the statute—

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[7] The Second Circuit sought support for its anti-textual approach not in *Cipollone*, which had said quite the opposite, but in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995), an ERISA preemption case in which this Court, according to the Second Circuit, "cautioned against 'uncritical literalism' when interpreting similarly open-ended language in the express preemption provision of another federal statute [i.e., ERISA]." (App. 9a) This Court has made clear, however, that the language of ERISA (or other "unhelpful" preemption provisions) is simply too different from that of the FCLAA to permit interpretation of the former to dictate that of the latter. *Compare Travelers Insurance Co.*, 514 U.S. at 656 (ERISA text described as "unhelpful") with *Cipollone*, 505 U.S. at 517 (FCLAA text described as clear). *See also Medtronic*, 518 U.S. at 488 (holding out Section 1334(b) as reasonable in scope and contrasting it with 21 U.S.C. § 360k(a), the broad preemption provision at issue in that case).

which was narrow and specifically targeted advertising content—was amended in 1969 to broaden significantly the preemptive scope of the statute. If, as the Second Circuit suggests, Congress was merely concerned with ensuring uniform regulation of cigarette advertising information (*see* App. 11a, 12a, 16a), the adoption in 1969 of a "much broader" preemption provision (as this Court described it in *Cipollone*) would hardly have been necessary. *See* pp. 11-12 above.

Finally, the content/location distinction of the court of appeals runs directly counter to this Court's recognition in *Cipollone* that a ban on advertising in particular media is precisely the kind of "diverse, nonuniform, and confusing" regulation that Congress sought to end when amending Section 1334(b) in 1969. *See Cipollone*, 505 U.S. at 515 n.11 (citing a California state ban on print and electronic cigarette advertisements as the type of diverse, non-uniform and confusing cigarette advertising regulation that prompted the broadening of Section 1334(b) in 1969). Even the Justices in *Cipollone* who viewed the 1969 Amendments to Section 1334(b) as "nonsubstantive in nature" (and who narrowly interpreted Section 1334(b)) acknowledged that, by adding the word "prohibition," Congress sought to "ensure that a State could not do through negative mandate (*e.g.*, *banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements) . . . ." *Cipollone*, 505 U.S. at 539 (Blackmun, J., concurring in part and dissenting in part) (emphasis added). This is precisely what Article 17-A tries to do through its draconian "location" restrictions.

In short, entirely apart from the direct circuit split that this case raises, the Second Circuit's opinion in this case ignores this Court's analysis in *Cipollone* to reach a result that Congress never intended. The case is well worthy of review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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